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No. 99-932

In the
Supreme Court of the United States
October Term, 1999

STANLEY and JUDY STEARNS, husband and wife, and GIG HARBOR MARINA, INC., a Texas Corporation, d/b/a ARABELLA'S LANDING MARINA,
Petitioners,

v.

CITY OF GIG HARBOR, a municipal corporation of the State of Washington,
Respondent.

GIG HARBOR MARINA, INC., a Texas Corporation, d/b/a ARABELLA'S LANDING MARINA, and STANLEY STEARNS and JUDY STEARNS, husband and wife
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v.

THE CITY OF GIG HARBOR, a municipal corporation,
Respondent.

On Petition for Writ of Certiorari to the Washington Supreme Court

REPLY TO RESPONSE TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state statute which penalizes private parties who appeal government regulatory decisions by requiring them to pay the government's attorneys' fees on appeal interferes with First Amendment rights to petition government for redress of grievances and free speech and Fourteenth Amendment rights to due process and equal protection?

2. Whether a state statute which imposes attorneys' fees against a private party who files a nonfrivolous appeal in judicial review of local government regulatory decisions conflicts with 42 U.S.C. §§ 1983 and 1988?

3. Whether a government entity's threat to seek attorneys' fees against private parties which chills the exercise of their statutory right of appeal violates the private parties' constitutional rights, and thus, entitles them to declaratory relief under 42 U.S.C. § 1983?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

INTRODUCTION 2

I THE CITY SERIOUSLY MISTATES THE FACTS 2

II THAT THE STEARNS DID NOT SUCCUMB TO THE CHILLING OF THEIR RIGHTS DOES NOT MEAN THE CHILL IS NOT LEGALLY COGNIZABLE 4

III STATE LEGISLATION MUST STILL MEET THE REQUIREMENTS OF DUE PROCESS 7

IV THE CITY ADMITS THE PURPOSE OF WASH. REV. CODE § 4.84.370 IS TO DISCOURAGE APPEALS 8

V THE CITY IS A PROPER DEFENDANT IN THE SECTION 1983 CLAIM 9

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Armendariz v. Penman,
75 F.3d 1311 (9th Cir. 1996) 7

Bloch v. Ribar,
156 F.3d 673 (6th Cir.1998) 5

Brown v. Board of Education,
347 U.S. 483 (1954) 6

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 6

Crawford-El v. Britton,
93 F.3d 813 (D.C.Cir.1996) 5

DeBlasio v. Zoning Board of Adjustment,
53 F.3d 592 (3rd Cir. 1995) 7

Mendocino Environmental Center v. Mendocino County,
192 F.3d 1283 (9th Cir. 1999) 5

Missouri Pacific Railway v. Tucker,
230 U.S. 340 (1913) 7

Patel v. Penman,
103 F.2d 868 (9th Cir. 1996) 7

Pearson v. Grand Blanc,
961 F.2d 1211 (6th Cir. 1992) 7

Romer v. Evans,
517 U.S. 620 (1996) 10

Silver v. Cormier,
529 F.2d 161 (10th Cir. 1976) 5

Stanley v. University of Southern California,
178 F.3d 1069 (9th Cir. 1999) 6

Supreme Court of Virginia v. Consumers Union,
446 U.S. 719 (1980) 9

Tri County Industries, Inc. v. District of Columbia,
104 F.3d 455 (D.C. Cir. 1997) 7

Wolff v. McDonnell,
418 U.S. 539 (1974) 7

Yee v. City of Escondido,
503 U.S. 519 (1992) 2

STATUTES

42 U.S.C. § 1983 i
42 U.S.C. § 1988 i
WASH. REV. CODE § 4.84.370 ..... 2, 6, 8, 9

RULES

Supreme Court Rule 12(4) 4

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INTRODUCTION

The petitioners herein (the Stearns) file this reply to the new issues raised by the City of Gig Harbor's (City) Response to Petition for Writ of Certiorari (City's Response).[1]

I
THE CITY SERIOUSLY MISTATES THE FACTS

At issue in this case is the constitutionality of WASH. REV. CODE § 4.84.370. No less than three times in the City's Response, the City falsely claims that it never sought, nor obtained an award of attorneys' fees against the Stearns under this statute. City's Response at 8 ("attorneys' fees have not been imposed against Stearns under RCW 4.84.370 – and may never be imposed"); 16 ("[t]he City never sought an actual award of attorneys' fees under the statute,"); and 17 ("the City never sought – and may never obtain – an award of attorneys' fees under the statute").

To the contrary, the City sought attorneys' fees under WASH. REV. CODE § 4.84.370 and the Washington Court of Appeals awarded fees in both cases presented to this Court, *Stearns v. City of Gig Harbor* and *Gig Harbor Marina, Inc. v. City of Gig Harbor*. Appendix P to the Petition for Writ of Certiorari (Petition) is a true copy of the Washington Court of Appeals' decision in *Gig Harbor Marina, Inc.*, wherein it ruled:

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[1] The City's Response lists three "Questions Presented for Review" which are different than those presented by the petitioners. Since the City did not file a cross-petition for writ of certiorari, it is unclear by what authority it can raise different questions presented for review. After all, "[a] litigant seeking review ... possesses the ability to frame the question to be decided in any way he chooses." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

> This Court awarded Respondent City of Gig Harbor a reasonable attorney fee pursuant to RCW 4.84.370.

App. P to Petition, at P-1.

Similarly, attached as Appendix D to the Petition is a true copy of the Washington Court of Appeals' decision in *Stearns v. City of Gig Harbor*, wherein it ruled:

> The respondents ask for attorneys' fees under RCW 4.84.370. ...
> ...
>
> The City is entitled to reasonable attorney's fees in an amount to be set by a commissioner of this court.

App. D to Petition, at D-12. The amount set by the commissioner is set forth in App. Q to the Petition.

The City's claim that it never sought and never obtained an award of attorneys' fees is patently false. The questions presented in the Petition are clearly ripe for this Court's review because the Washington Court of Appeals has already imposed the fee penalty on the Stearns.

Under the heading of "Opinion Below" in the City's Response at 1, the City claims that:

> Stearns has attached a copy of the Court of Appeals' in one of these unrelated cases as Appendix C to this Petition for Writ of Certiorari. It has absolutely no relevance to this case.

This statement, too, is untrue. Attached as Appendix C to the Petition is a copy of the Washington Supreme Court's denial of a petition for review in the lead case in this pending petition for certiorari. Attached as Appendix D to the Petition is the Court of Appeals' opinion in one of the two cases which are the very subject of this petition.[2]

Under the heading of "Counterstatement of the Case," the City states that the

> Superior Court ... granted the City's motion to dismiss Stearns' Section 1983 claim, finding that the Section 1983 claim was frivolous and awarding its attorneys' fees.

City's Response at 3. What the City left out renders the statement misleading. The Court of Appeals' **reversed** the lower court's imposition of sanctions for filing a frivolous claim. *See* Appendix to City's Response, at App. 16-17.

II
THAT THE STEARNS DID NOT SUCCUMB TO THE CHILLING OF THEIR RIGHTS DOES NOT MEAN THE CHILL IS NOT LEGALLY COGNIZABLE

The City raises the issue that the Stearns' rights to appeal were not chilled because they chose to appeal despite the threat of paying the City's attorneys' fees. However, the evidence of the chilling effect in Mr. Stearns' and Mr. Lindberg's declarations (App. K and L) was undisputed in the trial court.

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[2] The Stearns filed the Petition under the rule which allows a single petition to be filed for two judgments on identical issues. *See* Supreme Court Rule 12(4).

Moreover, the notion that the chill did not stop the Stearns from appealing does not mean that the chill did not exist. In *Silver v. Cormier,* 529 F.2d 161 (10th Cir. 1976), the Tenth Circuit ruled that the "right of access to the courts cannot be infringed upon or burdened," and that the official's threat burdened and chilled the plaintiffs' right of access even if the threat was "not actually effective." *Id.* at 163.

Other courts have come to the same or similar conclusion.

> Because it would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity, we conclude that the proper inquiry asks "whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities."

Crawford-El v. Britton, 93 F.3d 813, 826 (D.C.Cir.1996), *vacated on other grounds*, 520 U.S. 1273 (1997) (internal quotation marks and citation omitted); *see also Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999); *Bloch v. Ribar*, 156 F.3d 673, 681 (6th Cir.1998) (plaintiff has stated retaliation claim by alleging that "adverse action caused them to suffer an injury that would chill people of ordinary firmness from continuing to engage in their constitutionally protected activity").

The chill on the Stearns affected them even though it did not stop them from continuing in their First Amendment protected activity. The government should not benefit from that fact. Yet, the chill *was effective* in the case referred to by Richard Lindberg in his declaration. *See* App. L to the Petition. As an environmental activist, Mr. Lindberg represents an important segment of society with often a more

than ordinary firmness. The undisputed fact that an environmental activist was effectively chilled demonstrates the harm of WASH. REV. CODE § 4.84.370.

Moreover, the Ninth Circuit has recognized the inherent chill in imposing attorneys' fees or even costs in civil rights litigation. Not only is the exercise of one's individual rights jeopardized, but also the development of the law.

> [T]he imposition of such high costs on losing civil rights plaintiffs of modest means may chill civil rights litigation in this area. While we reject Stanley's claims, we also note that they raise important issues and that the answers were far from obvious. Without civil rights litigants who are willing to test the boundaries of our laws, we would not have made much of the progress that has occurred in this nation since *Brown v. Board of Educ.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

Stanley v. University of Southern California, 178 F.3d 1069, 1080 (9th Cir. 1999) (remand to re-tax costs in light of chilling effect on advocacy).

This Court has come to the same conclusion about the obvious chilling effect of attorneys' fee awards in Rule 11 cases. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) (Rule 11 must be read in light of concerns it will "chill vigorous advocacy"). If Rule 11's deterrent of frivolous pleadings by attorneys must be carefully applied so as not to chill vigorous advocacy, how much more should that principle be applied in the cases like the present where the purpose is to deter *nonfrivolous* appeals of review of government decision-making.

III
STATE LEGISLATION MUST STILL MEET THE REQUIREMENTS OF DUE PROCESS

The City claims that substantive due process no longer exists by relying on two Ninth Circuit opinions—*Patel v. Penman*, 103 F.2d 868 (9th Cir. 1996) and *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), *cited in* City's Response at 5. The City exaggerates the holdings of these cases and fails to disclose that there is a decisive split in the circuits over the applicability of substantive due process. *See Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992); *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592 (3rd Cir. 1995); *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997).

Moreover, the rationale in *Armendariz* of viewing takings of property under the Takings clause of the Fifth Amendment, rather than the substantive due process clause of the Fourteenth Amendment, does not apply in this case. The Ninth Circuit did not completely write substantive due process out of the Constitution, but rather reasoned that this protection will not be expanded to cover conduct covered elsewhere in the Constitution. 75 F.3d. at 1325. The Stearns do not call for *expanding* substantive due process. Rather, the United States Supreme Court has already held that penalized access to courts violates due process. *Wolff v. McDonnell,* 418 U.S. 539 (1974); *Missouri Pacific Railway v. Tucker*, 230 U.S. 340, 349 (1913).

In regard to the Stearns' procedural due process claims, the City claims that three hearings were provided to the Stearns prior to taking an appeal. City's Response at 7. The first two hearings are with the City itself—its hearing examiner and the city council. *Id.* Both are not formal hearings and even the third "hearing" before the Superior Court is admitted by the City to be based exclusively on the

administrative record. City's Response at 11.[3]

However, the City misses the point. The procedural due process violation is in having a hearing available to the Stearns and other land use litigants in the Court of Appeals, but subject to the threat of having to pay the City's attorneys' fees for filing a nonfrivolous, but unsuccessful appeal. *See* cases cited in Petition at 14-18.

IV
THE CITY ADMITS THE PURPOSE OF WASH. REV. CODE § 4.84.370 IS TO DISCOURAGE APPEALS

In an attempt to justify the purposes of the statute, the City recognizes that its purpose is to deter those who challenge government decision-making from filing an appeal.

> Without WASH. REV. CODE § 4.84.370, there is little to discourage land use litigants from abusing the appellate process, and seeking duplicative judicial review of the same land use decision. WASH. REV. CODE § 4.84.370 attempts to stem such abuse by striking a balance between protecting legitimate claims and discouraging meritless ones.

City's Response at 12.

The City's reasoning captures the precise harm of the statute. The government believes that any appeal is abusive and wants to punish meritless, *i.e.*, unsuccessful, appeals. Of

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[3] The City states that, "[u]nder LUPA, the superior court reviews the decision de novo, that is, the court looks to the administrative record to determine whether the land use decision is supported by substantial evidence." City's Response at 11. The City's use of the term "de novo" is nonsensical.

course, if the government loses in the trial court, it wants (and gets under this statute) the right to appeal without the same penalty for filing a losing appeal.[4]

V
THE CITY IS A PROPER DEFENDANT IN THE SECTION 1983 CLAIM

In regard to the Stearns' request for declaratory relief under Section 1983, the City argues that Stearns has not explained "how the City can be the target of a Section 1983 action for bringing a motion under the authority of a constitutional statute." City's Response at 17. Of course, if the statute is constitutional and the City's seeking to enforce it was constitutional, there is no Section 1983 claim. However, if the statute is unconstitutional as the Stearns allege, the City is a proper defendant.

This Court made clear in *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 736-37 (1980) that those who seek to enforce unconstitutional statutes are proper targets for claims for equitable relief under Section 1983. Hence, the City is a proper defendant in a claim under Section 1983 to declare the statute unconstitutional because the City is enforcing the statute by seeking fees.

CONCLUSION

The issues presented are concretely defined because the Stearns have already been assessed the City's attorneys' fees for filing a non-frivolous, but unsuccessful, appeal in

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[4] The City also argues that WASH. REV. CODE § 4.84.370 does not violate the separation of powers doctrine. City's Response at 13. The Stearns did not raise that doctrine in their Issues Presented for Review or in the body of their Petition.

review of the City's regulatory decisions. Such penalties are contrary to this Court's consistent and jealous guarding of equality for citizens who seek redress from government.

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.

Romer v. Evans, 517 U.S. 620, 633 (1996). Washington's punishment for unsuccessful appellants is in direct conflict with the Constitutional traditions of this Court.

The Stearns urge the Court to grant their Petition and confirm the right of citizens to enter courts on equal terms when petitioning for redress and review of government decision-making.

DATED: January 18, 2000

Respectfully submitted,

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